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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11 JEFF and HARRIET MILLHEISLER,
12 husband and wife and the marital community
composed thereof,

13 Plaintiffs,

14 v.

15 LINCOLN HIGH SCHOOL, and TACOMA
16 SCHOOL DISTRICT,

17 Defendants.

CASE NO. C07-5716RJB

ORDER GRANTING TACOMA
SCHOOL DISTRICT'S MOTION
FOR SUMMARY JUDGMENT

18 This matter comes before the Court on Tacoma School District's Motion for Summary
19 Judgment (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition
20 to the motion and the remainder of the file herein.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 This case arose out of a dispute that Jeffrey Millheisler, a teacher at Lincoln High School,
23 had concerning the teacher evaluation that he received in the 2004-05 school year. Mr.
24 Millheisler is a certificated teacher at Lincoln High School, where he has been teaching Computer
25 Aided Design ("CAD") and CAD related classes for the past seven years. Up until the 2004-05
26 school year, he had received only positive evaluations.
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1 Lincoln High School is part of the Tacoma School District. The Tacoma School District
2 and the Tacoma Education Association are parties to a collective bargaining agreement. Mr.
3 Millheisler, as a certificated school teacher in the Tacoma School District (“the District”), is
4 subject to the terms of this collective bargaining agreement (the “CBA”).

5 Under the terms of the CBA, teachers are to be evaluated annually. The procedures for
6 teacher evaluations are listed in Article 11 of the CBA. Under the CBA, teacher evaluations
7 include a pre-conference between the evaluator and the teacher, a formal observation, the
8 completion of an observation worksheet, and a post-observation conference between the
9 evaluator and the teacher.

10 Mr. Millheisler alleges that in February 2005, Ms. Lillian Ebersole, then Vice Principal of
11 Lincoln High School, sent an e-mail to Lincoln High School teachers explaining that she would
12 begin conducting teacher observations in the coming week. Mr. Millheisler claims that he
13 received a pre-observation form marked “high priority” in his staff mailbox on May 5, 2005.
14 Accompanying this form was a note dated May 2, 2008, stating that Ms. Ebersole wanted to
15 observe Mr. Millheisler’s third period class on May 6. Mr. Millheisler prepared the pre-
16 observation form as requested.

17 On May 6, 2005, Ms. Ebersole arrived at Mr. Millheisler’s classroom for the observation.
18 Mr. Millheisler contends that neither a pre-conference, nor a post-observation conference took
19 place. Mr. Millheisler also asserts that Ms. Ebersole appeared in his classroom again on May 9
20 for a formal observation, this time without providing him with any notice. Again, no pre-
21 conference preceded this observation. On May 12, 2005, Ms. Ebersole sent an e-mail message to
22 Mr. Millheisler, which stated, “I’ve processed your evaluation. Please see me Friday morning
23 during your planning period.” Dkt. 28, *Millheisler Decl.*, Ex. R.

24 On Friday morning, Mr. Millheisler reported to Ms. Ebersole’s office during his planning
25 period. At this meeting, Mr. Millheisler read the observation, which contained several
26 recommendations that he considered negative. For example, Ms. Ebersole recommended that Mr.
27 Millheisler “create a safe environment for students to guess”; “review policies on helping
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1 students”; “consider another way of communicating missing assignments”; and “audio or
2 videotape himself interacting with students.” Dkt. 28, *Millheisler Decl.*, Ex. F. In her summary,
3 Ms. Ebersole wrote, “I believe that Mr. M is a dedicated teacher with good intentions. He is
4 skilled in his knowledge of drafting and CAD program. However, in his attempt to build problem
5 solving and self-sufficiency skills in his students, he actually alienates them and creates a power
6 struggle.” *Id.*

7 During the meeting, Mr. Millheisler asked Ms. Ebersole if he had received a negative
8 evaluation. Ms. Ebersole told Mr. Millheisler that she had given him a positive evaluation.
9 However, on the evaluation form, Ms. Ebersole concluded, “I believe Mr. Millheisler should be
10 placed on long form evaluation in the upcoming school year.” *Id.*

11 At that time, Mr. Millheisler was being evaluated under Form 2 (short form). Teachers
12 are eligible for short form evaluation only after receiving four years of satisfactory Form 1 (long
13 form) evaluations. In essence, long form evaluation is utilized for newer teachers (those with
14 fewer than 4 years experience), or for teachers who have received unsatisfactory evaluations in
15 previous years.

16 Mr. Millheisler was “offended and upset” by Ms. Ebersole’s evaluation. Dkt. 28,
17 *Millheisler Decl.*, p.3. However, he alleges that he was unable to fully voice his concerns because
18 the meeting had taken up his planning period and threatened to make him late for his next class.
19 Mr. Millheisler signed the evaluation form before leaving to teach his next class.

20 Mr. Millheisler contends that he made several attempts over the summer of 2005 to obtain
21 administrative or legal advice in regards to his evaluation. He claims that he contacted a
22 representative of the Washington Education Association, who allegedly informed him that nothing
23 could be done because he had received a positive evaluation. Mr. Millheisler also claims that he
24 contacted a member of his union, the Tacoma Education Association, who informed him that
25 there had been no due process violation. Mr. Millheisler claims that he felt he had limited
26 remedies through the grievance procedure as a result of these alleged responses. However, Mr.

1 Millheisler does not allege that he ever read the CBA or familiarized himself with the grievance
2 procedures contained therein.

3 Mr. Millheisler returned to teach at Lincoln High School in the fall. On October 31, 2005,
4 he received an e-mail from the Principal, Patrick Erwin, stating, "I am placing you on long form
5 evaluation for this school year." Dkt. 28, *Millheisler Decl.*, Ex. G. Mr. Millheisler alleges that he
6 had intended to use the "professional growth plan" established in the CBA to enhance his
7 marketability as an educator and technical professional. However, under the terms of the CBA,
8 the professional growth plan is only available to certificated employees who would be scheduled
9 for short form annual evaluation. Mr. Millheisler responded to Mr. Erwin's e-mail on October 31,
10 and inquired whether the long form designation was punitive in nature. Mr. Millheisler also
11 asserted that he was entitled to the new professional growth plan process, and he requested that
12 the decision to put him on long form be reconsidered. Mr. Erwin responded on the evening of
13 October 31, stating that the decision was not a punitive action, but was rather "honoring the
14 conversations you had with Lillian [Ebersole] last year." Dkt. 28, *Millheisler Decl.*, Ex. G.

15 Also during the fall, Mr. Millheisler contacted his union to request that the District remove
16 the two pages of comments that Ms. Ebersole had made in his evaluation the previous year. The
17 union president, Gayle Nakayama, spoke with the HR director, Paul Apostle, who in turn spoke
18 with Ms. Ebersole. Ms. Ebersole agreed to this request.

19 Mr. Millheisler claims that on or about December 8, 2005, he had a pre-conference with
20 Mr. Erwin, who would be evaluating Mr. Millheisler's teaching. In the pre-conference, Mr. Erwin
21 allegedly confirmed that Mr. Millheisler would be evaluated under the long form and would not be
22 eligible for the professional growth plan. On December 12, 2005, Mr. Erwin observed Mr.
23 Millheisler's class, and a post-conference observation took place the following day.

24 On February 3, 2006, Ms. Nakayama sent Mr. Millheisler an e-mail regarding his request
25 to have the two pages of Ms. Ebersole's comments removed from his personnel file. In her
26 message, Ms. Nakayama wrote: "Good news! The last two pages have been removed. I saw it
27 happen!" Dkt. 28, *Millheisler Decl.*, Ex. H.

1 In March of 2006, Mr. Erwin conducted a second pre-conference, observation, and post-
2 observation conference with Mr. Millheisler. On April 16, 2006, Mr. Erwin completed Mr.
3 Millheisler's long form evaluation. Mr. Millheisler received satisfactory marks in all areas.

4 However, Mr. Erwin's long form evaluation contained a comment which caused Mr.
5 Millheisler concern. Mr. Erwin commented, "Mr. Millheisler is more approachable to students
6 while still maintaining the professional feeling in his classroom." Dkt. 28, *Millheisler Decl.*, Ex. I.
7 Mr. Millheisler contends that this comment "clearly referenced" Ms. Ebersole's prior evaluation.
8 *Complaint*, p.5. Mr. Erwin contends that the comment was not intended to be a comparison to
9 Ms. Ebersole's earlier evaluation.

10 Mr. Millheisler contends that he attempted to work with the union and school
11 administration from April to June of 2006 to clear up the comment Mr. Erwin made on the
12 evaluation form. On June 2, 2006, Mr. Millheisler filed a formal grievance with the District.
13 In his grievance form, Mr. Millheisler sought the following solutions: 1) retraction of the
14 statement in his 2005-06 evaluation ("Specifically, Mr. Millheisler is more approachable to
15 students while still maintaining the professional feeling in his classroom."); 2) a letter or
16 explanation from Mr. Erwin explaining why Mr. Millheisler was changed to long form without
17 union representation and the right to be heard; and 3) an explanation of why a second post-
18 conference was held. Dkt. 28, *Millheisler Decl.*, Ex. J.

19 The grievance procedure is outlined in Article 14 of the CBA. A Level I grievance
20 involves a discussion between the employee and his/her immediate administrator. Level II
21 grievances are those which were not resolved informally after Level I. At Level II, the employee
22 must reduce his or her grievance to writing and present it to the immediate administrator. If a
23 Level II grievance is not filed within fifty business days of the act or creation of the condition on
24 which the grievance is based, then the grievance is waived. If the aggrieved employee is not
25 satisfied with the disposition of the grievance at Level II, or if no decision has been rendered with
26 five business days after the presentation of the grievance, then Level III entails filing the grievance
27 in writing with the Superintendent. Finally, if the aggrieved party is not satisfied with the
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1 disposition of the grievance at Level III, the grievant may pursue a Level IV grievance by
2 requesting, in writing to the Tacoma Education Association, that the grievance be submitted to
3 arbitration.

4 On June 8, 2006, Mr. Erwin sent an e-mail to Mr. Millheiser and Ms. Nakayama. This e-
5 mail stated: "Confirming our earlier conversation: 1) Jeff (Millheiser) is on PGP (Professional
6 Growth Plan) next year. 2) The evaluation done by Lillian Ebersole is shredded and is no longer in
7 your file. 3) I will re-word the summary and provide a copy to Jeff, one for his file (replacing the
8 old one) and one for HR (also replacing the old one)." Dkt. 28, *Millheiser Decl.*, Ex. K.

9 On June 9, 2006, Ms. Nakayama wrote a letter to Mr. Millheiser which read "upon
10 receipt of the grievance response by Pat Erwin, I would like to say I believe you have achieved
11 everything achievable related to the grievance process." Dkt. 28, *Millheiser Decl.*, Ex. M. Ms.
12 Nakayama reiterated the three courses of action which Mr. Erwin stated he would take in his e-
13 mail of June 8, and she stated that Mr. Erwin had provided an explanation for why a second post-
14 conference had been held.

15 Ms. Nakayama also advised Mr. Millheiser not to pursue his grievance against Mr. Erwin
16 regarding Mr. Millheiser's being placed on long form evaluation without union representation.
17 Ms. Nakayama explained that "in light of the fact that this particular event occurred outside of the
18 50-day window for grievance, it would not be a timely grievance at this date." *Id.* She concluded,
19 "I do not recommend you forward any further with the grievance . . . [because] it would . . . be
20 ruled untimely." *Id.*

21 On June 16, 2006, Ms. Nakayama sent a letter to Ethelda Burke, the Deputy
22 Superintendent of Tacoma School District. In this letter, Ms. Nakayama informed Ms. Burke of
23 "breaches in the evaluation procedure" that occurred when Mr. Millheiser was evaluated by Ms.
24 Ebersole. *Millheiser Decl.*, Ex. L. Ms. Nakayama outlined five contractual requirements that
25 were not followed in the case of Mr. Millheiser. Ms. Nakayama further explained that "given Mr.
26 Millheiser was not aware of then of the 50-day requirement for filing grievances, a grievance was
27 not filed related to these violations." *Id.*

1 Mr. Millheisler alleges that he checked his personnel file on August 27, 2006. He claims
2 that at this time he was surprised and dismayed to find that Ms. Ebersole's original 2004-05
3 evaluation, and Mr. Erwin's 2005-06 evaluation with the comment "Specifically, Mr. Millheisler is
4 more approachable to students while still maintaining the professional feeling in his classroom"
5 remained in his personnel file.

6 Mr. Millheisler contends that in the fall of 2006, he approached Mr. Erwin and informed
7 him that his evaluations had not be revised as agreed upon through the grievance process. On
8 September 14, 2006, Mr. Erwin sent an e-mail to HR stating, "Jeff Millheisler shared with me that
9 his 2004-2005 evaluation is still on file down in HR. Jeff, Gayle, and I met last year and agreed
10 last year that there were some procedural irregularities and that the file should be removed. Can
11 you check to see if it is still there and then shred the document." Dkt. 28, *Millheisler Decl.*, Ex.
12 N.

13 On October 31, 2006, Mr. Millheisler alleges that he again checked his personnel file. He
14 claims that he was again surprised and dismayed to find that both Ms. Ebersole's original 2004-05
15 evaluation, and Mr. Erwin's original 2005-06 evaluations remained in his file unchanged. Mr.
16 Millheisler does not claim that he took any further immediate action in response to this alleged
17 discovery.

18 Mr. Millheisler further contends that he checked his personnel file again on February 8,
19 2007. He claims that Ms. Ebersole's and Mr. Erwin's original evaluations both remained
20 unchanged in his file. He also alleges that two printed e-mails had been placed in his file, and that
21 an unknown individual had made several notations to an addendum that Mr. Millheisler had
22 placed in the file. Finally, Mr. Millheisler alleges that a new, unsigned document titled "Prioritized
23 Employee Concerns - Lincoln High School" was in his file. This document summarized the
24 comments to which Mr. Millheisler had objected in Ms. Ebersole's original 2004-05 evaluation.
25 Additionally, this document contained the following language: "Mrs. Ebersole recommended long
26 form due to the negative interactions with students - up to the point where he alienates students
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1 and creates a power struggle. This is not news as he routinely does this with students and
2 parents.” Dkt. 28, *Millheisler Decl.*, Ex. P.

3 Upon making this alleged discovery, Mr. Millheisler did not contact anyone in the union or
4 attempt to invoke the grievance process. He claims that the District was retaliating against him
5 for his earlier grievance, and that the District had “allowed new retributive and intimidatory
6 material” to be inserted into his personnel file. *Millheisler Decl.*, p.7. He allegedly concluded that
7 “there was no benefit in continuing with the grievance procedure” because “it was completely
8 futile.” *Id.*

9 Mr. Millheisler alleges that on April 9, 2007, Mr. Gil Mendoza, the Executive Director of
10 Career and Technical Education, hand delivered a letter from the District. This letter, dated
11 March 30, 2007, informed Mr. Millheisler that he had become a displaced staff member. The
12 letter explained that one possible reason for displacement was reduced enrollment. Mr.
13 Millheisler was informed that he still had a continuing contract with the school, but that he would
14 have to apply for vacant positions as they were posted. The letter ended by stating, “If you think
15 there is an error in determining your status, or if you have any questions, please see your building
16 principal. He or she will contact Human Resources if further information or clarification is
17 needed.” *Noble Decl.*, Ex. 6. Mr. Millheisler also claims that Mr. Mendoza told him that he could
18 return to his job at Lincoln High School if he attended applied math training over the summer.

19 Mr. Millheisler alleges that Mr. Mendoza’s “ultimatum aroused suspicions.” *Complaint*,
20 p.7. Mr. Millheisler claims that no one had ever contacted him to inform him that his class
21 numbers were low, and that at the time he received his letter Lincoln High School’s master
22 schedule was not yet finalized. However, Lincoln High School’s class counts for Mr. Millheisler’s
23 classes show 1041 students for the 2004-05 school year, 947 students for the 2005-06 school
24 year, and 630 students for the 2006-07 school year. *Noble Decl.*, Ex. 7.

25 Mr. Millheisler contends that on May 10, 2007, the Lincoln High School Administration
26 reversed its earlier decision and “undisplaced” him. Mr. Millheisler felt that circumstances
27 surrounding his displacement were in violation of the CBA. Therefore, Mr. Millheisler pursued a
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1 Level I grievance, and had an informal meeting with Mr. Mendoza and Mr. Koval, the assistant
2 principal to address these concerns. However, Mr. Millheisler did not pursue his grievance to
3 Level II, explaining in his deposition “The grievance somehow didn’t go to Step [Level] II. I
4 don’t know what it is that stopped it.” *Deposition of Jeffrey Millheisler*, p.226.

5 Mr. Millheisler alleges that his personnel file still contained procedurally defective
6 documents as of December 12, 2007. He also claims that the experiences detailed above caused
7 him anxiety, depression, and insomnia. Mr. Millheisler alleges that he sought treatment from a
8 chiropractor and a massage therapist, and that in November 2006, he sought psychological
9 treatment from Dr. Trenton Williams. It is the professional opinion of Dr. Williams that “the
10 cause of Mr. Millheisler’s depression, anxiety and insomnia stems from, in significant part,” Mr.
11 Millheisler’s belief that the District had not evaluated him according to procedure, had not
12 rectified the flaws in the evaluation procedure, and had not fixed Mr. Millheisler’s personnel file.
13 *Williams Decl.*, p.2. Dr. Williams also referred Mr. Millheisler to Dr. Nagavedu Raghunath, who
14 prescribed Mr. Millheisler medicine for depression, anxiety and insomnia, and saw him for
15 psychiatric treatment.

16 On December 20, 2007, Mr. Millheisler served and filed, in Superior Court, a Summons
17 and Complaint for Procedural & Substantive 1983 Claim Deprivation of Property; Procedural &
18 Substantive 1930 Claim Deprivation of Liberty; Negligence; Outrage; Negligent Infliction of
19 Emotional Distress upon Defendant Tacoma School District. Mr. Millheisler named Lincoln High
20 School and Tacoma School District as defendants in this Complaint. On December 28, 2007, the
21 Tacoma School District removed Plaintiff’s case to this court.

22 On August 14, 2008, the Tacoma School District filed its Motion for Summary Judgment
23 (Dkt 12) with a request for oral argument. Plaintiff Jeff Millheisler filed his response (Dkt. 27) on
24 September 8, 2008, and Tacoma School District filed its reply (Dkt. 29) on September 12, 2008.
25 Because the motion is suitable for disposition without oral argument, Defendant Tacoma School
26 District’s request for oral argument is denied.

1 **II. DISCUSSION**

2 Defendant Tacoma School District now moves for summary judgment on the grounds that
3 Mr. Millheisler failed to exhaust the grievance procedure in the collective bargaining agreement,
4 that the District is not subject to liability under 42 U.S.C. § 1983; that Mr. Millheisler fails to state
5 a claim for deprivation of property, deprivation of liberty, or denial of substantive due process;
6 and that Mr. Millheisler's state claims are without merit. Dkt. 12.

7 **A. SUMMARY JUDGMENT STANDARD**

8 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
9 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
10 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
11 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
12 showing on an essential element of a claim in the case on which the nonmoving party has the
13 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
14 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
15 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
16 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some
17 metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
18 material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring
19 a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
20 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630
21 (9th Cir. 1987).

22 The determination of the existence of a material fact is often a close question. The Court
23 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
24 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*
25 *Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of
26 the nonmoving party only when the facts specifically attested by that party contradict facts
27 specifically attested by the moving party. The nonmoving party may not merely state that it will
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1 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial
2 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
3 Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be
4 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

5 **B. FAILURE TO EXHAUST**

6 The first issue is whether Mr. Millheisler's claims are barred because he failed to pursue
7 his remedies under the collective bargaining agreement's grievance procedure. Generally, federal
8 labor policy requires employees who allege violations of a labor contract to attempt to use the
9 contract's grievance procedure before seeking a judicial remedy. *Ervin v. Columbia Distributing,*
10 *Inc.*, 84 Wn. App. 882, 887 (1997), citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650,
11 652-53, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Similarly, under Washington law, an action to
12 obtain the benefits of a collective bargaining agreement cannot be maintained if a plaintiff does not
13 exhaust his or her contractual remedies through the grievance procedure provided for in the
14 contract. *Moran v. Stowell*, 45 Wn. App. 70, 75 (1986). Federal and state law are consistent in
15 regards to exhaustion. The exhaustion requirement applies only to employees "who allege
16 violation of a labor contract." See *Ervin*, 84 Wn. App. at 887; *Wilson v. City of Monroe*, 88 Wn.
17 App. 113, 115 (1997).

18 However, exhaustion of remedies under a collective bargaining agreement is not required
19 if resort to the agreement's grievance procedure would be futile. *Moran*, 45 Wn. App. at 71.
20 Also, if the aggrieved party had no notice of the administrative decision or no opportunity to use
21 the administrative review procedures, then the failure to exhaust is excused. *Id.*

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23 Mr. Millheisler does not dispute that he failed to exhaust his remedies under the collective
24 bargaining agreement. At no point did Mr. Millheisler pursue any grievance beyond Level II.
25 However, Mr. Millheisler argues that his failure to attempt to exhaust his remedies under the
26 collective bargaining agreement should be excused because any such attempt would have been
27 futile.
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1 The factual circumstances of a case rarely justify a finding of futility. *Grandmaster Sheng-*
2 *Yen Lu v. King County*, 110 Wn. App. 92, 110 (2002); *Dils v. Dept. of Labor & Industries*, 51
3 Wn. App. 216, 219 (1988). Generally, futility stems from a showing of bias or prejudice on the
4 part of the discretionary decisionmakers. *Baldwin v. Sisters of Providence in Washington, Inc.*,
5 112 Wn.2d 127, 131 (1989). Moreover, the policies underlying exhaustion impose a substantial
6 burden on a litigant to show futility. *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 110.

8 An individual's subjective belief that available grievance procedures would be futile is
9 generally insufficient to invoke the futility exception to the exhaustion requirement. *See Baldwin*,
10 112 Wn.2d at 133 ("the principle that a subjective belief of futility is sufficient to invoke the
11 exception would conflict with a strong bias toward requiring exhaustion in Washington"); *Dils*, 51
12 Wn. App. at 219 ("even remedies Dils thought to be unavailing should have been pursued").
13 Moreover, a claimant's dissatisfaction with an agency's alleged delays does not excuse the
14 claimant's failure to exhaust his administrative remedies. *Dils*, 51 Wn. App. at 220.

16 Plaintiff argues that summary judgment must be denied because the District has not
17 pointed to any facts showing the absence of evidence on the issue of futility. In a motion for
18 summary judgment, the moving party has the burden of showing that there are no issues of fact
19 with respect to the possible futility of the non-moving party's efforts to exhaust contractual
20 remedies. *Baldwin*, 112 Wn.2d at 131. This may be accomplished by pointing to specific
21 pleadings, affidavits, or depositions showing the absence of evidence on the issue of futility. *Id.*
22 Here, the Tacoma School District has consistently pointed out in its pleadings that Mr. Millheiser
23 lacks any evidence of alleged futility in the grievance process. Moreover, the Tacoma School
24 District has submitted evidence that it is the policy and practice of the District to follow and
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1 comply with the terms of the collective bargaining agreement. *Schreurs Decl.*, p.2. In contrast,
2 Plaintiff has offered no evidence of futility beyond the allegations contained in his pleadings.

3 Mr. Millheisler alleges that pursuing the grievance process would have been futile because
4 the process produced agreements that the District “did not respect and still does not respect.”
5 *Plaintiff Millheisler’s Response to Defendant’s Motion for Summary Judgment*, p.10. He further
6 argues that the grievance procedure “produces nothing but inaction and indifference to previous
7 agreements.” *Id.* at 11. However, Plaintiff’s belief that the pursuing the available grievance
8 procedures would have been futile appears entirely subjective; he offers no objective evidence of
9 futility.
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11 In the briefing, Plaintiff first directs the Court to *Bonser v. Safeway, Inc.*, 809 F.Supp. 799
12 (D.Colo. 1992), a case from the United States District Court for the District of Colorado. First, it
13 should be noted that *Bonser* is not binding authority on this Court. Next, the facts of *Bonser* and
14 the present case are highly dissimilar. *Bonser*, unlike the present case, focuses on an alleged
15 violation of a settlement. Although Plaintiff argues that the *Bonser* court “agreed with
16 Employee’s futility argument,” the Court in *Bonser* ultimately granted the defendant’s motion for
17 summary judgment, and the case does not support Plaintiff’s futility argument.
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19 Plaintiff also requests that the Court consider *Baldwin*, 112 Wn.2d 127, in deciding the
20 issue of futility. In *Baldwin*, the plaintiff’s argument was premised largely upon his subjective
21 belief that the grievance process would have been futile. The *Baldwin* Court observed that “the
22 principle that a subjective belief of futility is sufficient to invoke the exception would conflict with
23 a strong bias toward requiring exhaustion in Washington.” *Id.* at 133. However, the Court then
24 noted that *in addition* to the plaintiff’s subjective belief of futility, evidence also indicated (1) a
25 close working relationship between the administrator and the assistant administrator, (2) a
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1 situation where the first three persons in the grievance process were actively involved in the
2 decision to fire the plaintiff, and (3) a particularly inflammatory and sensitive incident which
3 resulted in plaintiff's termination. *Id. Baldwin* stands for the proposition that a claimant's
4 subjective belief of futility alone is insufficient to invoke the futility exception. Accordingly, Mr.
5 Millheisler can not rely on *Baldwin* to excuse his failure to exhaust.
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7 It is also hard to argue that taking a grievance to the superintendent, or to arbitration, is
8 futile, when Plaintiff has not tried those avenues of relief. Mr. Millheisler has failed to raise a
9 material issue of fact as to the futility of pursuing the grievance process under the CBA. Because
10 it is undisputed that Mr. Millheisler failed to exhaust his remedies under the CBA, he may only
11 pursue claims based on violations not covered by the CBA.
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13 **C. CONSTITUTIONAL CLAIMS**

14 Plaintiff's first and second causes of action are procedural and substantive due process
15 claims under Section 1983. Section 1983 is a procedural device for enforcing constitutional
16 provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton*
17 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under 42 U.S.C. § 1983,
18 plaintiffs must demonstrate that (1) the conduct complained of was committed by a person acting
19 under color of law and that (2) the conduct deprived a person of a right, privilege, or immunity
20 secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527,
21 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Section
22 1983 is the appropriate remedy only if both elements are satisfied. *Haygood v. Younger*, 769 F.2d
23 1350, 1354 (9th Cir. 1985). In addition, plaintiffs must allege facts demonstrating that individual
24 defendants caused, or personally participated in causing, the alleged harm. *Arnold v. IBM*, 637
25 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely
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1 on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*
2 *Services*, 436 U.S. 658, 694 n.58 (1978).

3 **1. Procedural Due Process**

4 The Fourteenth Amendment protects individuals from the deprivation of property without
5 due process of law. There are three elements for procedural due process claims under Section
6 1983:(1) a property interest protected by the Constitution; (2) a deprivation of that interest by the
7 government; and (3) a lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904
8 (9th Cir. 1993). A public employer may meet its due process obligations by providing a collective
9 bargaining agreement if that agreement contains grievance procedures that satisfy due process.
10 *Armstrong v. Meyers*, 964 F.2d 948, 950 (9th Cir.1992).

11 A government employee has a constitutionally protected property interest in continued
12 employment when the employee has a legitimate claim of entitlement to the job. *Board of*
13 *Regents v. Roth*, 408 U.S. 564, 577 (1972). Laws, rules, or understandings derived from
14 independent sources, such as state law, create such claims of entitlement. *Id.* A mere expectation
15 that employment will continue does not create a property interest. *Id.* If under state law,
16 employment is at-will, then the claimant has no property interest in the job. *Id.*

17 **2. Substantive Due Process**

18 The Fourteenth Amendment’s Due Process Clause “cover[s] a substantive sphere, . . .
19 barring certain government actions regardless of the fairness of the procedures used to implement
20 them.” *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). This substantive component
21 protects individuals from “the exercise of power without any reasonable justification in the service
22 of a legitimate governmental objective.” *Id.* at 846; *see Engquist v. Oregon Dept. of Agriculture*,
23 478 F.3d 985, 996-97 (2007) (noting that “most courts have rejected the claim that substantive
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1 due process protects the right to a particular public employment position” and recognizing a
2 substantive due process claim for a public employer’s violations of occupational liberty limited to
3 extreme cases, such as blacklisting).

4 **3. Liability of School Districts Under Section 1983**

5 The language of Section 1983 is expansive and does not expressly incorporate common
6 law immunities. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980). Municipalities
7 and other local governing bodies, such as school districts, are subject to suit under Section 1983.
8 *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978); *Lytle v. Carl*, 382 F.3d 978,
9 982 (9th Cir. 2004). Municipalities are not liable merely for employing tortfeasors, and
10 respondeat superior is an insufficient basis for establishing municipal liability. *Monell*, 436 U.S. at
11 690. Rather, plaintiffs must establish that a policy or custom of the municipality caused the
12 constitutional injury. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 507
13 U.S. 163, 166 (1993). This requirement distinguishes acts of the municipality from acts of
14 municipal employees. *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).

15 If an employee commits a constitutional violation pursuant to a longstanding practice or
16 custom, the custom allegedly causing the rights violation need not receive municipal ratification in
17 order to serve as the basis for a claim under Section 1983. *Monell*, 436 U.S. at 691. Plaintiffs
18 contending that they were singled out for unconstitutional treatment must establish the presence
19 of a longstanding practice or custom or must demonstrate that the person causing the violation
20 has final policymaking authority, that the final policymaker ratified the rights violation, or that the
21 final policymaker acted with deliberate indifference to a subordinate’s constitutional violations.
22 *Christie*, 176 F.3d at 1235.

23 **4. Plaintiff’s First Cause of Action**

1 Plaintiff's first cause of action is a procedural and substantive Section 1983 claim for
2 deprivation of property. Specifically, Mr. Millheiser claims that he has a property interest in his
3 career, the characteristics of his career, and his relationship to his career.

4
5 Mr. Millheiser contends that Ms. Ebersole's acts and omissions in her evaluation of Mr.
6 Millheiser denigrated his property interest in his career, the characteristics of his career, and his
7 relationship to his career, thereby depriving him of property without due process of law. Mr.
8 Millheiser makes similar assertions in regards to Mr. Erwin's evaluation of Mr. Millheiser, his
9 agreement to rectify procedurally defective evaluations and his alleged subsequent failure to do
10 so. Additionally, Mr. Millheiser argues that Lincoln High School and the Tacoma School District
11 deprived him of property without due process of law by displacing him and subsequently
12 "undisplacing" him without regard for procedure. Finally, Mr. Millheiser contends that the acts
13 of Ms. Ebersole, Mr. Erwin, Lincoln High School, and the Tacoma School District were arbitrary
14 and capricious, and therefore violated Mr. Millheiser's right to substantive due process.

15
16 Mr. Millheiser's claims arise from alleged violations of contractual rights arising from the
17 CBA. Ms. Ebersole's alleged failure to adhere to procedural requirements in her evaluations, Mr.
18 Erwin's alleged violations in regards to Mr. Millheiser's evaluations and personnel file, and
19 Lincoln High School and the Tacoma School District's alleged violations in regards to Mr.
20 Millheiser's temporary displacement are all examples of conduct subject to grievance under the
21 CBA. Because Mr. Millheiser failed to exhaust his remedies under the CBA, his procedural and
22 substantive Section 1983 claim for deprivation of property is barred.

23
24 Even if Mr. Millheiser's first cause of action was not barred for failure to exhaust, his
25 Section 1983 deprivation of property claim lacks merit. Plaintiff has failed to show that any
26 deprivation of a property interest actually occurred. Mr. Millheiser was not terminated, nor was
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1 his salary ever reduced as a result of defendants' alleged conduct. The employment difficulties
2 and issues Plaintiff describes do not rise to the level of a protected property interest.

3 Mr. Millheisler contends that because certificated teachers are not distinguished from each
4 other by rank or title, one of the only ways to indicate objective rank is being allowed on PGP.
5 *Millheisler Dec.* ¶12. Therefore, Mr. Millheisler asserts his not being placed on PGP for one year
6 was "tantamount to a demotion, denying a promotion, and/or denigrating Mr. Millheisler's
7 employment rank and status." Dkt. 27 at p.20. However, Plaintiff has failed to provide any
8 authority supporting this contention, nor has he provided any evidence that this contention
9 amounts to anything more than his subjective belief.
10

11 Finally, Mr. Millheisler contends that the offending material in his personnel file could
12 impede his future career development within or outside the District. In effect, Plaintiff argues that
13 Defendants' conduct may possibly result in a future deprivation of some property interest.
14 However, plaintiffs can not bring suit for deprivations of property that have not yet occurred.
15 Because Plaintiff has failed to show a deprivation of a property interest, an analysis of school
16 district liability and official "policy or custom" is not necessary. Plaintiff has failed to exhaust his
17 remedies under the CBA, and he has failed to show that he has been deprived of any property
18 interest. Therefore, Plaintiff's first cause of action should be dismissed.
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21 **5. Plaintiff's Second Cause of Action**

22 Mr. Millheisler's second cause of action is a procedural and substantive Section 1983
23 claim for deprivation of liberty. Specifically, Mr. Millheisler asserts that he has a liberty interest in
24 his good name, reputation, and honor and integrity. Plaintiff argues that the aforementioned acts
25 and omissions of defendants and their agents denigrated his liberty interest in his good name,
26 reputation, and honor and integrity, thereby depriving him of liberty without due process of law.
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1 Again, Mr. Millheisler's claims arise from alleged violations of contractual rights arising
2 from the CBA. Because Mr. Millheisler failed to exhaust his remedies under the CBA, his
3 procedural and substantive Section 1983 claim for deprivation of liberty is barred.
4

5 Aside from being procedurally barred for failure to exhaust, Plaintiff's deprivation of
6 liberty claim lacks merit. Generally, due process protections are triggered when a public
7 employee is terminated and stigmatizing charges are published. *Mustafa v. Clark County School*
8 *District*, 157 F.3d 1169, 1179 (9th Cir. 1998). To take advantage of these due process
9 protections, an employee must show that 1) the accuracy of the charge is contested; 2) there is
10 some public disclosure of the charges; and 3) the charge is made in connection with termination of
11 the employment. *Id.* Additionally, harm to reputation alone is insufficient to implicate an
12 individual's liberty interest. *Id.*
13

14 Here, Mr. Millheisler was not terminated. Because Mr. Millheisler was not terminated and
15 he has not provided any evidence of publication of stigmatizing charges or harm to his reputation,
16 his second cause of action should also be dismissed on that ground.

17 **D. STATE CLAIMS**

18 In addition to asserting claims for violation of his constitutional rights, Mr. Millheisler
19 asserts state claims of negligence, outrage, negligent infliction of emotional distress, and negligent
20 misrepresentation. The District seeks summary judgment, contending that there are no genuine
21 issues of material fact as to any of these state claims.
22

23 **1. Plaintiff's Third Cause of Action**

24 Plaintiff's third cause of action is a state claim of negligence. Plaintiff asserts that Lincoln
25 High School ("Lincoln") owes its teachers various duties related to teacher evaluations. For
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1 example, Plaintiff contends that Lincoln has a duty to its teachers “to execute a meaningful,
2 helpful and objective evaluation system.” *Complaint*, p.11.

3 Mr. Millheisler alleges that Lincoln breached this duty by ignoring pre-conference and
4 post-conference requirements, fraudulently filling in dates for events that did not occur, giving
5 teacher evaluations without notice, providing misinformation, and failing to remedy
6 acknowledged errors and omissions. Mr. Millheisler further asserts that these alleged breaches
7 were the actual and proximate cause of his damages, which he describes as including vocational
8 damage, loss of enjoyment of career, reputation damage, medical costs, anxiety and depression,
9 and attorneys fees and costs.
10

11 Once again, the alleged negligence consists of conduct covered by the grievance process
12 of the CBA. Therefore, Plaintiff’s negligence claim is barred for failure to exhaust the available
13 remedies under the CBA.
14

15 Even if Plaintiff’s negligence claim were not barred for failure to exhaust, Plaintiff has still
16 failed to raise a genuine issue of material fact as to this claim. To support a claim for negligence,
17 a party must prove (1) the existence of a duty owed to the injured party; (2) a breach of that duty;
18 (3) a resulting injury; and (4) that the claimed breach is the proximate cause of the injury. *Hansen*
19 *v. Friend*, 118 Wn.2d 476, 485 (1992). The existence of a duty is a question of law. *Snyder v.*
20 *Medical Service Corp.*, 145 Wn.2d 233, 243 (2001).
21

22 Generally, a breach of contract (e.g. a collective bargaining agreement) does not give rise
23 to an action in tort. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217,
24 230 (1990). Only “if a duty exists independently of the performance of the contract” can a
25 contract provide the basis for a tort claim. *Id.*
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1 Here, Plaintiff argues that sections of RCW 28A.405 and various state regulations give
2 rise to an independent duty for the Tacoma School District to evaluate certificated teachers fairly,
3 take responsibility for the evaluations' outcomes, and manage personnel files. *Plaintiff*
4 *Millheisler's Response to Defendant's Motion for Summary Judgment*, p.12. However, Plaintiff
5 can point to no authority that establishes such a duty. Although Plaintiff does not explicitly state
6 so, it appears that he is arguing for the extension of existing law, or the creation of new law.
7 Plaintiff invites the Court to interpret RCW 28A.405.100 as imposing civil liability on evaluators
8 and entities that fail to follow statutory guidelines.

10 Specifically, Plaintiff points to the following language in RCW 28A.405.100:

11 During the probationary period the evaluator shall meet with the
12 employee at least twice to supervise and make a written evaluation
13 of the progress, if any, made by the employee. The evaluator may
14 authorize one additional certificated employee to evaluate the
15 probationer and to aid the employee in improving his or her areas of
16 deficiency; such additional certificated employee shall be immune
17 from any civil liability that might otherwise be incurred or imposed
18 with regard to the good faith performance of such evaluation.

17 RCW 28A.405.100.

18 It is not clear that the legislature envisioned civil liability for school districts that do not
19 comply with the evaluation guidelines set forth in RCW 28A.405.100. The statutory language
20 cited above is the only reference to any type of liability found anywhere in RCW 28A.405.
21 Additionally, the language cited above appears limited to the evaluation of employees placed on
22 probation for unsatisfactory work.

24 None of the authority cited by Plaintiff provides that school districts shall be civilly liable
25 to teachers for errors in the evaluation procedure. Furthermore, a review of the legislative history
26 of RCW 28.405 shows no discussion on civil liability for school districts. There are no
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1 Washington cases that have held a school district liable for errors in employee evaluations. The
2 only passing mention of civil liability in the statute and regulations cited by Plaintiff appears
3 limited to good faith evaluations of teachers placed on probation for unsatisfactory work. The
4 Court declines Plaintiff's invitation to interpret ambiguous statutory language to impose sweeping
5 liability on school districts that fail to strictly comply with RCW 28.405.100's evaluation criteria.
6 Accordingly, Plaintiff's negligence claim should also be dismissed for that reason.
7

8 9 **2. Plaintiff's Fourth Cause of Action**

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11 Plaintiff's fourth cause of action is for outrage, also known as intentional infliction of
12 emotional distress. Again, the events underlying this claim arose from conduct covered by the
13 CBA, so Plaintiff's claim is barred for failure to exhaust.

14 The events underlying Plaintiff's claim, viewed in a light most favorable to the Plaintiff, do
15 not create a genuine issue of material fact as to intentional infliction of emotional distress.
16 Intentional infliction of emotional distress requires proof of three elements: (1) extreme and
17 outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe
18 emotional distress to the plaintiff. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195 (2003). The tort of
19 outrage does not encompass mere insults, indignities, threats, or annoyances. *Id.* at 196. A
20 plaintiff is assumed to be "hardened to a certain degree of rough language, unkindness, and lack
21 of consideration." *Id.*
22

23
24 The offending conduct must be "so outrageous in character, so extreme in degree, as to go
25 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in
26 a civilized community." *Id.* at 196. Whether particular conduct rises to the requisite level of
27 outrageousness is "ordinarily a question of fact for the jury." *Dombrosky v. Farmers Ins. Co. of*
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1 Washington, 84 Wn. App. 245, 261 (1996). The Court, however, may dismiss a claim if
2 reasonable minds could not differ as to whether the alleged conduct was sufficiently extreme. *See*
3 *id.* at 261-62.

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5 The facts underlying this claim are the alleged errors in the evaluation procedure, Lincoln
6 High School's alleged refusal to remedy these errors, and Plaintiff's displacement and subsequent
7 "undisplacement." Such conduct is not "so outrageous in character, so extreme in degree, as to
8 go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable
9 in a civilized community." *Kloepfel*, 149 Wn.2d at 196. Therefore, Plaintiff's outrage claim
10 should be dismissed.

11 12 **3. Plaintiff's Fifth Cause of Action**

13 Plaintiff's fifth cause of action, which he also failed to exhaust under the CBA, is for
14 negligent infliction of emotional distress. In Washington, the tort of negligent infliction of
15 emotional distress requires a showing that (1) the defendant owed a duty of care to the plaintiff,
16 (2) the defendant breached that duty, (3) the breach is a proximate cause of damages, and (4)
17 damages did indeed result. *Snyder*, 145 Wn.2d at 243.

18
19 Whether there is a duty owed is a question of law that "depends on mixed considerations
20 of 'logic, common sense, justice, policy, and precedent.'" *Keates v. Vancouver*, 73 Wn. App.
21 257, 265 (1994). In the employment context, employers are under no duty to provide a
22 workplace free of stress. *Snyder*, 145 Wn.2d at 243.

23
24 The Washington Supreme Court recognizes that some wrongful acts do not result in legal
25 liability and that "mental distress is a fact of life." *Hunsley v. Giard*, 87 Wn.2d 424, 435 (1976).
26 Perhaps for this reason, Washington courts have been reluctant to find a duty to act reasonably
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1 when responding to disputes. *Bishop v. State*, 77 Wn. App. 228, 234-35 (1995) (“Therefore, we
2 hold that absent a statutory or public policy mandate, employers do not owe employees a duty to
3 use reasonable care to avoid the inadvertent infliction of emotional distress when responding to
4 workplace disputes.”).

5
6 Plaintiff argues that there is a clear statutory and public policy mandate governing teacher
7 evaluation procedures, and that this mandate imposes a duty to use reasonable care. As support,
8 Plaintiff cites to RCW 28A.405 and the various state regulations cited for his negligence claim.
9 Again, Plaintiff fails to cite, and the Court’s research has not revealed, authority articulating or
10 supporting the theory that school districts owe their teachers a duty to use reasonable care in the
11 evaluation process and that a breach of such duty would result in civil liability. Plaintiff’s
12 negligent infliction of emotional distress claim is not only barred for failure to exhaust, but the
13 theory underlying his claim is also unsupported by the law. Therefore, Plaintiff’s fifth cause of
14 action should also be dismissed for that reason.
15

16 **4. Plaintiff’s Sixth Cause of Action**

17
18 Plaintiff’s final cause of action is a state claim of negligent misrepresentation. This claim is
19 premised on the representations that Plaintiff alleges that Lincoln High School made regarding his
20 evaluations. Again, this alleged misconduct is covered by the grievance process of the CBA, and
21 Plaintiff’s claim is barred for failure to exhaust.
22

23 Additionally, Plaintiff has failed to state a *prima facie* case for his negligent
24 misrepresentation claim. Washington has adopted the elements of negligent misrepresentation set
25 forth by the Restatement (Second) of Torts: “One who, in the course of business, profession, or
26 employment, . . . supplies false information for the guidance of others in their business
27 transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance
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1 upon the information, if he fails to exercise reasonable care or competence in obtaining or
2 communicating the information.” *Van Dinter v. Orr*, 157 Wn.2d 329, 332 (2006).

3
4 In other words, to establish a claim for negligent misrepresentation, a plaintiff must show
5 that the defendant negligently supplied false information the defendant knew, or should have
6 known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably
7 relied on the false information. *Id.* at 333. Additionally, the plaintiff must show that the false
8 information was the proximate cause of the claimed damages. *Id.* The proof of such a claim must
9 be clear, cogent, and convincing. *Id.*

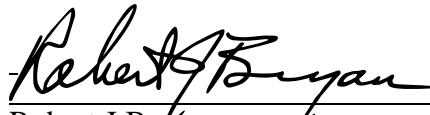
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11 Here, Plaintiff has failed to show how the allegedly false information guided him in any
12 business transaction. Additionally, he has failed to show that he suffered any pecuniary loss as a
13 result of his reliance on the allegedly false information. Because Plaintiff failed to exhaust his
14 remedies under the CBA, and because he has failed to state a *prima facie* case, his negligent
15 misrepresentation claim should be dismissed.

16 17 **III. ORDER**

18 Therefore, it is hereby

19 **ORDERED** that Tacoma School District’s Motion for Summary Judgment (Dkt 12) is
20 **GRANTED**, and this case is **DISMISSED**.
21

22 DATED this 24th day of September, 2008.

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24 
25 Robert J Bryan
United States District Judge
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